Promises to Keep: We are the Constitution's Framers*

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In 1952, when my parents moved out of New York City to the suburb of Spring Valley, N.Y., I was one of two Black kids in my fourth grade class. There were three of us wearing "All the Way with Adlai" buttons amidst a sea of "I like Ikes." And when Mrs. Rose allowed us to bring our radios in to listen to the Subway Series between the Yankees and the Dodgers, there were five of us cheering our hearts out for the Bums from Brooklyn and against what was then America's team, the Yanks. Eisenhower and the Yankees won and "Under God" was inserted into the Pledge of Allegiance between "One Nation' and With Liberty and Justice for All."

I mouthed but did not vocalize the last two words of the Pledge. I'd seen the sign at the lake resort outside of town that read "No Niggers, Jews or dogs allowed." I did not know then that in the year of my birth the U.S. Supreme Court had held that I could not be compelled to say the Pledge to the Flag, but I did know that I was not among the "all" to which the Pledge referred.

The following spring my family travelled south to visit relatives. We packed picnic lunches and dinners to avoid the humiliation of being sent to the back door of diners. My parents had grown up in Mississippi and were veterans at coping with Jim Crow. By avoiding the segregated eateries and hostelries of the South, we were laying the evidentiary foundation for the Commerce Clause argument the Supreme Court would rely upon ten years later, but I had no awareness of my part in constitutional history.

That May, *Brown v. Board of Education*[1] was decided. Although I'd heard of the NAACP and even met Thurgood Marshall at a

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1. Brown v. Bd. of Educ., 347 U.S. 483 (1954).

church dinner, I think that this was the first time I had heard of the Supreme Court. There was much rejoicing in my house. Nine white men in black robes had lifted the veil of legally sanctioned segregation from our heads. But even at the tender age of ten, I sensed that *Brown* was not so much a benignly bestowed gift as the fruit of a hard won struggle. Even at this young age, I understood that the struggle had just begun.

While I sensed intuitively that the Constitution only protected those who protected themselves, I also had a naive idealism about the nature of constitutional struggle. I was able to confront my classmates face to face. We played ball and cut class together and fought over whether Mickey Mantle or Willie Mays was the better centerfielder. When as a high school student, I picketed the local Woolworths and asked my white buddies not to patronize them because their stores in the South would not serve Blacks at the lunch counter, they honored my request. I was a friend whose humanity was important to them. They promised only to shoplift and not to buy. When we sponsored a Pete Seeger concert to raise money for SANE, the local chapter of the American Legion picketed the concert. It was a cold day and we served coffee to the picketers, most of them fathers of my classmates, and talked politics face to face. When I refused to participate in a nationwide civil defense drill, the guys on the football team asked why. I told them and they listened and thought. I was more skeptical than most of my friends about the constitutional platitudes we were fed in civics class, but I was a romantic about the possibilities of the struggle.

On May 6 of this year, United States Supreme Court Justice Thurgood Marshall delivered a speech entitled "Celebrating the Constitution. A Dissent."[2] Justice Marshall distanced himself from the flag-waving fervor and celebratory spirit that has been the hallmark of this year's 200th birthday of the U.S. Constitution. He began his speech as follows:

> Like many anniversary celebrations, this one takes particular events and holds them up as the source of all the very best that has followed. Patriotic feelings will surely swell, prompting proud proclamations of the wisdom, foresight, and sense of justice shared by the Framers and reflected in a written document now yellowed with age. This is unfortunate—not the patriotism itself but the tendency

2. Marshall, *The Constitution: A Living Document*, 30 How. L.J., 623 (1987).

> to oversimplify, to overlook the many other events that have been instrumental to our achievements as a nation. The focus of this celebration invites a complacent belief that the vision of those who debated and compromised in Philadelphia yielded the "more perfect Union" it is said we now enjoy.
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> I cannot accept this invitation, for I do not believe that the meaning of the Constitution was forever "fixed" at the Philadelphia Convention. Nor do I find the wisdom, foresight, and sense of justice exhibited by the Framers particularly profound.[3]

A Washington Post article reporting Justice Marshall's speech began by asking, "Is Justice Thurgood Marshall the Grinch of the Constitution's 200th birthday party?"[4] My mother called that same day and said, "Did you read what Thurgood said about the constitutional bicentennial? Wasn't it wonderful? That man made my week."

My mother had voiced a response to Justice Marshall's words that was echoed the length and breadth of this nation's Black community. Many thoughtful whites commended his speech as well, but his words were much more than a correct or even an insightful analysis to us. His voice was our voice. His articulation of our perspective, of what we see and feel daily, was a liberating event. He was Joe Louis pummeling Max Schmelling, he was Jackie Robinson making us all Brooklyn Dodger fans, he was Muhammed Ali resisting the draft, and Martin Luther King preaching a powerful poetic sermon about a dream that each of us shared. He was for us what Frederick Douglass had been for our great grandparents when on a Fourth of July he said,

> Fellow citizens, pardon me, and allow me to ask, Why am I called upon to speak here today? Perhaps, you mean to mock me. For what have I to do with your celebration? What, to the American slave is your Fourth of July? I answer, A day that reveals to him, more than all other days in the year, the gross injustice and cruelty to which he is the constant victim. To him, your celebration is a sham; your boasted liberty, an unholy license; your national greatness, swelling vanity; your sounds of rejoicing are empty and heartless; your denunciation of tyrants, brass-fronted impudence; your shouts of liberty and equality, hollow mockery; your prayers and hymns, your sermons and thanksgivings, with all your religious parades and solemnity, are to him, mere bombast, fraud, deception,

3. *Id.* at 623-24.

4. The Washington Post, May 9, 1987 at A22.

> impiety, and hypocrisy—a thin veil to cover up crimes which would disgrace a nation of savages.[5]

Justice Marshall's words and those of America's greatest abolitionist share a common theme. It is a theme which brings our nation's ideals and its realities face to face, a theme which confronts us with our contradictions. Marshall indicts the founding fathers for devising a government which was "defective from the start."[6] He notes that when the framers used the words "We the people" in the Constitution's Preamble:

> they did not have in mind the majority of America's citizens . . . . On a matter so basic as the right to vote, Negro slaves were excluded, although they were counted for representational purposes—each as three-fifths of a person. Women did not gain the right to vote for over a hundred and thirty years.[7]

It is important to note that Justice Marshall does not attribute these defects to negligence or lack of know-how on the part of the Framers. "These omissions were intentional,"[8] he says. The written record of the Framer's debate on slavery cannot be denied. Nor can the provisions of the document itself; the "three fifths" provisions in Art. I, Sec. 2, the bar on prohibiting the importation of slaves in Art I, Sec. 9, and the "fugitive slave" provision of Art. IV, Sec 2.

Some contemporary commentators have responded to Justice Marshall's indictment by arguing that the Constitution cannot be condemned for being a creature of its times. They characterize the infamous slavery compromises of 1787, as necessary, if unfortunate, decisions influenced by the then prevailing beliefs that slavery was on the decline and would soon die of its own weight; that Africans and their descendants were a different and inferior breed of beings. That the property interests of slave owners were preserved at the cost of freedom for Blacks is seen as a small anachronism in an otherwise brilliant testament to democracy and individual liberty.[9]

But, the slavery compromises were much more than a casual concession to the contemporary mores of the day. The debate over the

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5. H. APTHEKER, A DOCUMENTARY HISTORY OF THE NEGRO PEOPLE IN THE UNITED STATES, 331, 334 (1967).

6. *Id.* Marshall, *supra* note 2, at 624.

7. *Id.*

8. *Id.*

9. *See generally* Marshall, *supra* note 2, at 623.

morality of slavery was already a vigorous one in 1787, and the framers knew full well the moral ramifications of what they did. The constitutional dilemma rested not in a failure to understand the immorality of the enslavement of other human beings or that slavery conflicted with the framers' idealism regarding the worth of the individual, but in the conflict between this aspect of individual liberty and their more pressing pragmatic concern for the protection of vested property and political status based on wealth.

Recall that for the framers, propertied white men all, property was a fundamental extension of the individual, and the social compact was chiefly designed to protect those distributions of wealth that they saw as arising out of the varying talents and efforts of society's members. (Never mind that the largest part of this wealth was produced through the labor of those who they held in bondage.) The framers simply chose to give priority to one facet of individual liberty over another. They chose, quite rationally, to preserve liberty for a very limited segment of the national community - *themselves.*

Justice Marshall cites Chief Justice Roger Taney's infamous passage from the *Dred Scott* case to make his point that the original intent of the Framers was "far too clear for any ameliorating construction."[10] "[Negroes] had for more than a century been regarded as beings of an inferior order, and altogether unfit to associate with the white race . . .; and so far inferior, that they had no rights which the white man was bound to respect."[11] But as Professor Derrick Bell has noted, Chief Justice Taney may have missed the point. "It was not as he proclaimed . . . that the Constitution's commitment to individual liberty was not intended for Africans, but that the Constitution's injunctions went to those who owned property—a qualification that excluded many whites as well as most Blacks."[12]

In recent years, I have begun my first constitutional law lecture by recollecting a New Yorker cartoon of several years ago. The cartoon depicts a typical New York Yuppy cocktail party. One guest, a law student explaining his professional goals, said "my short-term interests are in civil liberties but my long-term interests are in real es-

10. *Id.* at 626.

11. Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 407 (1857).

12. Bell, *Victims as Heroes: A Minority Perspective on Constitutional Law*, Speech delivered to the Yale Law School Legal Theory Workshop, March 26, 1987.

tate." I relate this cartoon in part as a challenge to my students not to follow suit. But the cartoon also speaks to the constitutional dilemma between this nation's commitment to property and its commitment to humanity.

The Framers chose property and resolved the apparent contradiction between the primacy of property and the broadly stated commitment to humanity by defining Blacks and other people of color as outside the community of human beings. Women were relegated to a similar nonparticipatory status by a different but no less effective ideology that characterized them as less than fully developed humans, as childlike and in need of protection. It should not surprise us that Ed Meese, William Rehnquist and Robert Bork are advocates of original intent or that Thurgood Marshall has called for a different vision of the Constitution, a vision "nurtured through two turbulent centuries of our own making."[13]

The power of Marshall's vision of the meaning of the Constitution is that it includes *us*—all of us—that it calls upon each of us to be active participants in making the Constitution; in deciding which constitutional values will be given primacy. Marshall's vision calls upon all of us to be Framers.

Professor Hanna Pitkin has written that there are two uses of the word constitution that do not refer to the Constitution of the United States but that are worth attending to in considering how we may give meaning to that document.

"The first of these uses is constitution in the sense of composition or fundamental make-up, the constituent parts of something and how they are put together, its characteristic frame or nature."[14] When we speak of a person's constitution we refer to her physical makeup (we say she has a robust or a delicate constitution) or of her temperament or character. "With respect to a community this use of the word constitution suggests a characteristic way of life, the national character of a people, a product of a particular history and social conditions."[15] A constitution is SOMETHING WE ARE, a mode of self-articulation.

"The second use of constitution which deserves our attention is its function as a verbal noun pointing to the action or activity of con-

13. Marshasll, *supra* note 2, at 627.

14. Pitkin, *The Idea of the Constitution*, 37 J. OF LEGAL ED. 167 (1987).

15. *Id.*

stituting—that is, of founding, framing, shaping something anew."[16] Constitution describes the human capactiy to make a new beginning. A constitution is SOMETHING WE DO. A constitution can be seen as activity—as political struggle. As Justice Marshall so aptly pointed out, our founding fathers were men, not gods and we have the same powers that they exercised in framing our Constitution. We have the human capacity for creative action. "We are the species that constitutes itself, that collectively shapes itself, not just genetically through reproduction, as all species do, but culturally, through history."[17] We take responsibility for what we are by shaping and doing, but not every action we take is a successful extension of our true selves. This effort to express our true selves is the subject of constitutional discourse, a discourse which should not be restricted to lawyers, judges and scholars, but should be engaged in by us all.

In 1787, the vast majority of us were excluded from this constitutional discourse. The continuing legacy of our exclusion is this: for those who are intent on maintaining a status and power gained through wealth and property, the contradiction between the ideals of liberty and equality and the primacy of property requires a rationalization. Some explanation must be devised that hides from us and themselves the gaping chasm between the ideal and the real. Constitutional doctrine has provided this rationalization in the social Darwinism of economic substantive due process,[18] in the intent requirement's disregard of culturally ingrained and therefore often unconsciously motivated racism and sexism,[19] or in the state action doctrine's immunization of private clubs and corporations from constitutional scrutiny.[20]

For those of us who have been and continue to be excluded the contradiction between the ideal and the real is enabling. We know that we are part of a struggle about the meaning of the Constitution, a struggle about how we shall be constituted, about who we are and how our values are best articulated and acted out. Professor Jerry Lopez

16. *Id.* at 168.

17. *Id.*

18. Lochner v. New York, 198 U.S. 45 (1905).

19. Washington v. Davis, 426 U.S. 229 (1976); *See also* Lawrence, *The Id, the Ego and Equal Protection, Reckoning With Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

20. Moose Lodge v. Irvis, 407 U.S. 263 (1972); Flagg Brothers, Inc. v. Brooks, 436 U.S. 922 (1978).

has said that "[c]onstitutions result from fighting. They establish social arrangements that express both in their original detail and in their ongoing adjustments what fighting continues to be about—not just in elections [or constitutional conventions] but in day-to-day living."[21]

It is not happenstance that those who have been most oppressed in this country have been the keepers of the dream. It is not fortuitous that Blacks, browns, women, gays and other stigmatized and marginalized persons have been in the vanguard of progressive Constitutional change. It is in *our* interests to close the Constitution's contradictions. *We* are liberated by the knowledge that we are in a fight about who we are and how we shall be constituted, and our liberation has served to liberate all Americans.

During the past several weeks, as I have listened to the Iran-Contra hearings, I have been struck by the presence of a countervailing force that threatens the vitality of this participatory struggle that is our Constitution's chief promise. The hearings seemed to me a golden opportunity for engaging the public in Constitutional debate and yet they appear to be having quite the opposite effect. The major media has played into the public's need for bread and circuses. Network coverage of the hearings has replaced the soaps but there is little change in tone. Tom Brokaw called Ollie North a "Can Do" man without stopping to ask whether we really wanted a government run by Rambo. In a random survey of 100 people on the street 92 knew who Fawn Hall was while only 20 knew the name of the Chief Justice of the Supreme Court.

Network television has done much to take the self out of self-governance by making government a spectator sport. The adversarial press is fast disappearing as access to mass communication becomes largely a function of wealth. The media does not always tell us what to think, but they have been strikingly successful in telling us what to think about or by sheer dint of overexposure in eroding our critical faculties altogether. Professor Neil Postman has noted that in Huxley's *Brave New World* "Big Brother does not watch us by his choice. We watch him by ours."[22]

21. Lopez, *The Idea of a Constitution in the Chicano Tradition*, 37 J. OF LEGAL ED. 162, 163 (1987).

22. N. POSTMAN, AMUSING OURSELVES TO DEATH: PUBLIC DISCOURSE IN THE AGE OF SHOW BUSINESS 155-58 (1955).

Justice Marshall has served us well in reminding us that the handful of propertied white men that met in Philadelphia made us very few promises that we would have them keep. Even the Bill of Rights was a belated concession to more populist state legislatures. If the Constitution has any unfulfilled promises they are those which we and others like us, who have gone before, have made to ourselves. It is we who must fight to give the due process and equal protection clauses a meaning that reflects our values. It is we who must insure that the Constitutionally regulated powers of the executive not be usurped by fascist fanatics who think that the buck should stop with an unelected military officer. It is we who must demand that our senators just say no to Robert Bork and any other candidate who would relegate women, gays and people of color to second class citizenship.

In this year of the Bicentennial of our Constitution we must recapture the naivete and idealism about Constitutional discourse that I experienced as a youth. We must speak to our friends and neighbors face to face. We must remind them and ourselves that we are our Constitution's Framers and that we neglect that solemn responsibility at our own peril.

We the People

of

insure domestic Tranquility, provide for the common defe.

and our Posterity, do ordain and establish this Constitutio.

Article. I.

Section. 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and H
of Representatives.

Section. 2. The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the
in each State shall have Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United
and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respe
Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding I
not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the Unit
and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one f
thirty, but each State shall have at least one Representative; and until such enumeration shall be made, the State of New Hampshire sh
entitled to chuse three, Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsy
eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.

Section. 3. The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof for six Years; and e
Senator shall have one Vote.

Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three Classes.
of the Senators of the first Class shall be vacated at the Expiration of the second Year, of the second Class at the Expiration of the fourth Year, and of the
Class at the Expiration of the sixth Year, so that one third may be chosen every second Year; and if Vacancies happen by Resignation, or otherwise, dur
Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall the
such Vacancies.

No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and w
when elected, be an Inhabitant of that State for which he shall be chosen.

The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.

The Senate shall chuse their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Off
President of the United States.

The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the
of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office
Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punish
according to Law.

Section. 4. The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legis
thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they shall
appoint a different Day.

Section. 5. Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constit
a Number to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members
such Manner, and under such Penalties as each House may provide.

Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and with the Concurrence of two thirds, e
a Member.

Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment req
Secrecy; and the Yeas and Nays of the Members of either House on any question shall at the Desire of one fifth of those Present, be entered on the Journal.

Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other P
than that in which the two Houses shall be sitting.

Section. 6. The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Tr
the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the
Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questi
any other Place.

No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United
which shall have been created, or the Emoluments whereof shall have been encreased during such time; and no Person holding any Office under the
States, shall be a Member of either House during his Continuance in Office.

Section. 7. All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on
Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the
United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall
the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the
it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it
become a Law. But in all such Cases the Votes of both Houses shall be determined by yeas and Nays, and the Names of the Persons voting for and
the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays e
after it shall have been presented to him, the same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent
Return, in which Case it shall not be a Law.

Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjour